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CONFLICT OF LAWS—THE PER AND THE POST.—Treating of the common law doctrine of survivorship between joint tenants and commenting upon Littleton's discussion of that theme, Lord Coke instances the case of a joint tenant's devise of his share of the joint tenancy and points out that the surviving joint tenant would take priority over the devisee by virtue of the principle of survivorship, because the will takes effect only *after* the testator's death (*post mortem*) while the right of the survivor is already vested *by or through* such death (*per mortem*), "whereby it appeareth," says Lord Coke, "that Littleton, by these words—*post mortem et per mortem*—though they jump at one instant, yet alloweth priority of time in the instant, which he distinguisheth by *per* and *post*." [1]

It is proposed here to point out another instance of more frequent application in which the distinction made by Littleton and Coke between taking in the *per* and in the *post* is important.

The marriage of a *feme* effects great changes in her legal status and property rights. In the first place, if she marries a man domiciled in a state other than her own, it is the settled rule of private international law that she instantly becomes domiciled in the state where he lives.[2]

Again, under the rules of the common law, upon marriage the wife's tangible chattels, in the absence of antenuptial agreement, become the absolute property of her husband; and such of her choses in action as are reduced by him into possession during the

[1] 1 TH. CO. LIT., 752 *et seq.*
[2] MINOR, CONFL. LAWS, § 46; JACOB, DOM., § 209.

coverture become his also.[3] In recent times these principles have been greatly modified in most English-speaking countries so as to permit the wife to retain her property more or less as her separate estate after marriage. On the other hand, in the states whose systems of law are based on the civil law the rule of "community property" is recognized.[4]

Another consequence of the woman's marriage in many states is that it revokes any will previously executed by her.[5] These will suffice to illustrate the principle now under examination.

Just as, in the case already noted of the conflicting rights of the devisee of a joint tenant and the surviving cotenant, the latter attains priority because he claims in the *per,* by or through the death of the tenant, while the devisee can claim only in the *post,* after the death of the tenant, so in the case of the marriage of a *feme* her domicil is changed to that of her husband in the *per,* by or through the marriage, while the other consequences of her union, such as the transfer of her personalty to the husband, the revocation of her previously executed will, etc., take effect in the *post,* after the marriage.

Wherever therefore such after effects of the woman's marriage are dependent upon the law of the domicil, it must follow that it is the law of her husband's domicil at the time of the marriage, not the law of her domicil at the moment preceding it, that will determine them.

Thus it is a well settled rule of private international law that the *lex domicilii* determines the marital rights of each consort in the personalty of the other, that is, the law of that domicil possessed by the parties at the moment the alleged right vests, if it vests at all.[6] Hence if a woman domiciled in one state were to marry a man domiciled in another, and he or his creditor were to claim that the wife's personalty belonging to her prior to the marriage is his by marital right under the rules of the common law, the change of the wife's domicil to his would take place *per* the marriage, while his claim to her personalty would arise *post* the marriage. Thus at the time his right vests, if it vests at all, the wife would be domiciled with

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[3] 1 MINOR, INSTS., 4 ed., 325, 330; 2 BL. COM., 433, 434; 2 KENT, COM., 143.

[4] For example, under the laws of France, in the absence of special contract, the husband and wife, by a kind of partnership, are entitled each to one-half of the personalty belonging to either of them at the time of the marriage or acquired afterwards by title of succession or by gift (unless otherwise provided by the donor); and to one-half of all real estate acquired by either during the continuance of the marital relation, except such as might be acquired by inheritance or by gift. Code Civil, § 1401. See Harrall *v.* Wallis, 37 N. J. Eq. 458; Note to Locke *v.* McPherson (Mo.), 85 Am. St. Rep. 564 *et seq.*

[5] 1 Vict. c. 26, § 18; Va. Code, 1904, § 2517; Loustalan *v.* Loustalan, L. R. (1900) 211; Phaup *v.* Wooldridge, 2 Dall. 286, 2 Am. Lead. Cas. 765 *et seq.*

[6] MINOR, CONFL. LAWS, § 81; Note to Locke *v.* McPherson, *supra.*

him, and it would be the law of that domicil that should determine their respective rights.[7]

Again, it is established that the law of the testator's domicil determines most of the questions that may arise touching wills of personalty—amongst others the question whether the will has been legally revoked.[8] And if the testator be a woman whose marriage to a man domiciled in another state or county is alleged as the ground of revocation of her will, we would once more have an application of the principle that the change of the wife's domicil takes place in the *per,* through or by the marriage, while the revocation of the will would take effect, if at all, in the *post,* after the marriage, so that the question whether her will is revoked by the marriage would depend upon the law of her domicil immediately after the marriage (that is, her husband's domicil at that time), not by the law of her domicil prior thereto.

This is well illustrated in the Scotch case of *Westerman* v. *Schwab,*[9] the essential facts of which were as follows. Miss Scott, domiciled in England, executed a will in English form in 1897, disposing of personal estate. Some years later she married Westerman who was then, and (with his wife) continued to be until death, domiciled in Scotland. She never by any express act revoked her will. Under the English Wills Act[10] "every will made by a man or woman shall be revoked by his or her marriage;" but by Scotch law the marriage did not revoke her will. The contest was between Schwab and other legatees on the one side, claiming that the law of Mrs. Westerman's domicil after the marriage (Scotland) should govern, and Worth and others of her next of kin overlooked by the will, claiming that the law of her domicil just prior to her marriage (England) ought to determine if the will was thereby revoked.

The first tribunal trying the case held that the Scotch law must govern and that the will remained valid and effectual despite the subsequent marriage of the testatrix. But on appeal to a higher tribunal this decision was reversed, and it was held that the English law controlled and that the will was revoked by the marriage. Still another appeal was taken to the Scotch Court of Session, which in an interesting opinion returned to the law of Scotland as the proper law to determine the question.

In *Loustalan* v. *Loustalan*[11] practically the same point was presented. In that case the lady in question was undoubtedly French in origin. She came over to England and entered domestic service with an English family. While in England, she made a will, not executed according to the law of England, but validly executed according to French law. About four years later she left domestic

[7] MINOR, CONFL. LAWS, § 81; Harrall *v.* Wallis, *supra;* Parrett *v.* Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479; Note to Locke *v.* McPherson, *supra.*

[8] MINOR, CONFL. LAWS, § 149.

[9] Court of Sessions (Sc.) 8 Sess. Cas. (5th Series) 132.

[10] 1 Vict. c. 26, § 18. [11] *Supra.*

service and established a laundry business in London. In the same year she married a French refugee who was flying from France at that time to escape prosecution for some offense. They lived together for some years in England and then he and his wife parted company, she remaining in England, he returning to France. While matters stood thus she died, leaving no will except the old one she had made as a spinster. The point was whether that will had been revoked by her marriage. The majority of the court took the view that the husband was domiciled in England at the date of the marriage and held that the wife's will was thereby revoked; but Lord Lindley, M. R., differed from his two colleagues as to the husband's domicil at that time, locating it in France. He was therefore of the opinion that the French law should control, under which the will was not revoked by the marriage. But all agreed that it was the law of the husband's domicil at that date, not that of the wife's prior to the marriage, which must be applied.

Raleigh C. Minor.

UNIVERSITY OF VIRGINIA.

THE ANOMALOUS DOCTRINE OF PUNITIVE DAMAGES.—The exceptional or anomalous doctrine of allowing punitive damages in tort actions, although at variance with the general rule of compensation which is undoubtedly the central idea of the law of damages, has been set forth and imbedded in the great majority of the American cases upon this subject.[1] But this doctrine is not only inconsistent with the central principle of the law of damages—therefore logically wrong—but also seems to be contrary to equity and justice. The principle owes its origin to the old rule that the jury were the sole judges of the damages.[2] Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages which the court was powerless to set aside. The early cases amount to no more than a refusal to set aside such verdicts;[3] but from the intemperate language sometimes used by the judges in justifying these verdicts, the doctrine of exemplary damages sprang up, well characterized as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."[4] The principle was also confused with that allowing compensation for mental suffering, the circumstances of aggravation which would justify exemplary damages being generally such as would naturally cause mental suffering.[5] Under the modern

[1] SEDGW., DAM., § 353.
[2] SEDGW., DAM., § 354.
[3] Huckle *v.* Money, 2 Wils. 205; Beardmore *v.* Carrington, 2 Wils. 244; Merest *v.* Harvey, 5 Taunt. 442.
[4] HALE, DAM., 303.
[5] Wiggin *v.* Coffin, 3 Story 1, Fed. Cas. 17, 624. In Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270, Foster, J., said: "If compensation were now understood, as it formerly was to be made for injuries to material substance only, and exemplary damages were now understood as they were formerly, to refer to injuries to the spiritual or mental part of